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Supreme Court, U.S.
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No. (1)

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

RONALD CURTIS CHAMBERS,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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This is a capital case.

QUESTION PRESENTED

In *Abdul-Kabir v. Quarterman*, the majority of this Court promised that new sentencing trials would not be required in every case, reassuring the dissenters that "in several instances, we concluded, after applying the relevant law, that the special issues provided for adequate consideration of mitigating evidence." 127 S. Ct. 1654, 1672 & n.20 (2007). But that promise is fundamentally inconsistent with the relief granted in this case. Indeed, the lower court's grant of relief is based on scant and unpersuasive evidence. Further, the lower court has now elevated poverty, a class and economic disadvantage, with the personal liabilities previously categorized as *Penry* evidence. Thus, the lower court's decision gives rise to two important questions:

1. The court of appeals interpreted this Court's remand as instructions to reverse, believing that the majority of the Court found some of Chambers's evidence to be beyond the scope of Texas's former sentencing special issues. Did the court of appeals err in holding Chambers's "scant" evidence of economic disadvantage had relevance to the special issues in a way the jury was unconstitutionally precluded from considering?

2. The court below held in *Nelson v. Quarterman*,[1] that *Penry* error is structural and not subject to a harmless-error analysis. Bound by that decision, the lower court refused to consider the persuasiveness, relevance or even amount of Chambers's evidence. Did the court of appeals erroneously refuse to consider whether Chambers –who has been thrice convicted and sentenced to death for this same crime– was actually harmed by any error that occurred at sentencing?

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[1] 472 F.3d 287, 314-15 (5th Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 2974 (2007).

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OPINION BELOW

After this Court remanded for reconsideration in light of *Abdul-Kabir*, the court of appeals reversed the district court's denial of habeas corpus relief and remanded with instructions to grant the writ. PA I: 4 (*Chambers v. Quarterman*, slip op. No. 03-11248, 2007 U.S. App. LEXIS 29832, 2007 WL 4553657 (5th Cir. Dec. 27, 2007)).[2]

JURISDICTION

The Director's petition for writ of certiorari is timely filed on or before April 28, 2008. Sup. Ct. R. 13.3 (West 2008). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

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[2] "PA" refers to the appendix to the instant petition for certiorari review. "Tr" refers the to transcript, the clerk's record of pleadings and documents filed in the trial court. "RR" refers to the reporter's record of transcribed trial proceedings.

STATEMENT OF THE CASE

I. Facts of the Crime

On Thursday, April 10, 1975, Mike McMahan, a Texas Tech student, was in Dallas for a convention. 39 RR 107-10. By the early morning hours of the next day, the police would find Mike murdered, his body savagely beaten and shot.

The morning of April 10th, Mike contacted Deia Roberts (née Sutton), a former classmate to ask if she wanted to get together with him and his friends at a nightclub called Wellington's. 39 RR 109-10, 112 & 114. Deia agreed and met Mike at her home around 10:30 p.m. 39 RR 111. At Wellington's, they ordered a drink, danced, and chatted with Mike's friends. 39 RR 115. Deia and Mike left at about 12:45 a.m. 39 RR 115-16.

As they approached Mike's car, Deia noticed a car parked next to it with four men sitting inside. 39 RR 111 & 116-17. As Mike was putting his keys in the ignition, two of the men got into Mike's car. 39 RR 118. Chambers was the first man to get in the car. 39 RR 119. Deia turned to face Chambers, who instructed her, "Don't move or I'll shoot you." 39 RR 120. Deia noticed that Chambers had a pistol and he told Deia to get in the back seat in a mean and angry tone. 39 RR 121-23. Chambers's cohort, Clarence Ray Williams was the driver. 39 RR 122-24. When she got in the back seat, Deia noticed a shotgun on the floor in front of Chambers. 39 RR 124-25. Chambers told Williams to get out of there, so Williams backed up and drove off. 39 RR 124-26.

Deia's purse was in her lap, and Chambers took it and emptied it out. 39 RR 126-27. Chambers instructed Mike to take off his pants and hand them over, then Chambers emptied the pockets and returned the pants. 39 RR 127-29. Next, Chambers demanded Deia's coat and watch. 39 RR 129-30. Whenever Deia looked at Chambers, he repeated, "Don't look at me." *Id.* Deia described Chambers as mean and completely in control. 39 RR 132.

Williams drove to a remote location and stopped the car near the levee. 39 RR 134-36. Chambers ordered everyone out. 39 RR 136. Deia asked for her purse back, but Chambers refused, saying there would be fingerprints on it. *Id.* Deia noticed that the car she had seen earlier was parked behind them. 39 RR 137. Chambers ordered everyone down the levee, and led the way. 39 RR 137-38. Chambers had both the shotgun and the pistol. 39 RR 138. When the couple did not move, Williams pushed them. 39 RR 139. Mike was on Deia's right, and they walked three-fourths of the way down until Chambers yelled for them to stop. *Id.*

Chambers ran behind the couple, and Deia stepped toward Mike and took his hand. 39 RR 140. Mike asked in a scared manner what the robbers wanted them to do, saying that they would cooperate. 39 RR 142. Deia heard a gunshot; Mike fell screaming and rolling down the hill. *Id.* She heard a second gunshot, and a third that hit her in the back of the neck. *Id.* The bullet that struck Deia lodged at the base of her brain and remains there to this day. 39 RR 142-43. After Deia fell screaming, there were shots to each side of her. 39 RR 143.

When the shooting stopped, Mike was ten to fifteen feet from Deia, and she was face down on the ground. 39 RR 143. She heard footsteps, the two men running to the car, and two car doors slamming. 39 RR 144 & 182. Mike called to her in a soft voice, "Deia, are you all right?" 39 RR 144. Deia was so frightened she did not answer, so Mike called again louder this time. 39 RR 145. Deia hushed him, "Don't talk, be quiet," and she heard the car door open. 39 RR 147 & 182. Then Deia heard the driver say, "Hey, man, they're not dead." 39 RR 147. Chambers replied, "They gotta be dead. I shot 'em in the head," but Williams said again, "No, man, they're not dead." 39 RR 148.

Deia heard footsteps running back to Mike. 39 RR 145. She heard Chambers say, "Get up, boy." 39 RR 145 & 148. Mike did not get up, and Chambers said again, "Get up, boy." 39 RR 148. Deia "heard this horrible thud and Mike screamed." *Id.* Deia heard footsteps coming towards her. 39 RR 149. The driver told her to "Get up," but she did not move. *Id.* Williams hit Deia in the back with his fist, and pulled her up on her knees by her shirt. *Id.* She was facing Williams and could see past him where Chambers was standing over Mike. *Id.* Chambers "was holding the shotgun and he was swinging it down at--hitting him in the head, over and over and . . . Mike was screaming and you could hear thud. It was a horrible sound." *Id.*

Chambers beat Mike's head ten to twenty times, and Williams hit Deia in the face several times. 39 RR 150. Chambers instructed Williams, "Take 'em to the water," and Williams grabbed Deia and took her to the water at the bottom of the hill. *Id.* Williams told Deia to put her face in the water, and pushed her face into it. 39

RR 151. This occurred a couple of times, during which Deia held her breath as long as she could before pushing up from the water. *Id.* & 39 RR 192. When she pushed up, she "could hear Mike screaming and hear that horrible sound." 39 RR 151. Williams pulled Deia up on her knees facing Mike and Chambers, and Williams began choking her. 39 RR 151-52. She could still see Chambers swinging the shotgun at Mike's head as Mike screamed, but "Mike quit screaming and he quit swinging that gun, and then the driver let go of me." 39 RR 152. Deia knew she "was going to be next," and Chambers came toward her. *Id.* Deia said, "God, please don't kill me," and put her hands over her head as Chambers swung down and hit her three times with the shotgun. *Id.* & 39 RR 207. Williams said, "She's dead. Let's go." 39 RR 153.

Deia lay there and could not get up. *Id.* She was not sure if she was cold or dead, she was tingly, and she felt like she should stay down because if she got up, she "knew what had just happened." *Id.* Deia was talking to herself, so she figured she must not be dead, and she tried to count to sixty but could not get past twelve and had to keep starting over. *Id.* Her whole body began to shake, her fingers were tingly, and her toes were cold. *Id.* Deia was shaking so much she was afraid someone would see her, and she knew she needed to get help. 39 RR 153-54. She crawled to Mike, called his name several times with no answer, and shook him. *Id.* She sensed he was dead. *Id.*

Deia started walking from the bottom of the levee quoting scripture and praying for sustenance to find aid. *Id.* Eventually, she was able to make it into the LeBaron Hotel cold, wet, caked in blood and mud. *Id.* She was

frightened and desperately wanted for people to go find Mike, but all she could say was, "He's on the other side." *Id.*

Meanwhile, Chambers returned to the Dallas projects. 38 RR 157. Juliet Stephanie Jones ("Stephanie"), who was thirteen years old at that time, lived with her mother. 38 RR 154-55. Stephanie knew Chambers and she remembered that he came to her mother's home with a shotgun that night. 38 RR 155-57. Chambers knocked on the door, came inside, put a shotgun –which was broken in two– in the kitchen sink to rinse the blood and hair off of it. 38 RR 158-59. Once he was done, Chambers sat down and talked with Larry Donnel Bickems ("Bickems"), and Williams. 38 RR 161. Chambers had Deia's coat, purse, and wallet. 38 RR 163-64 & 166-67. Williams had her watch. 38 RR 172. Bickems took some credit cards out of the purse, burned them in a pot, and took them outside. *Id.* Chambers wiped blood off of the money and then sat at the table dividing it up. 38 RR 169.

Stephanie agreed that Chambers was his regular, normal self. 38 RR 170. In fact, she testified that Chambers seemed to be in a good mood. 38 RR 175. Chambers and Bickems played dominoes while Stephanie braided Chambers's hair. 38 RR 174-75. And when they were finished playing dominoes, Chambers went to sleep upstairs. 38 RR 175. Bickems, who had been in the other vehicle that followed Chambers to the levee, testified that Chambers was acting normal, and nothing was out of the ordinary about him. 39 RR 37. He also testified that he heard Chambers refer to Mike saying "his head was hard" and that Chambers boasted he "started to rape her." 39 RR 16, 19, 24, 36-37 & 280.

When the police located Mike's body, his face had been driven down into the mud. 38 RR 119. "He had part of his skull broken out and was hanging aside his head, with brain matter oozing out." 38 RR 115. Mike's body was then taken to the medical examiner for an autopsy. 38 RR 55-57. The medical examiner echoed the officer's description of Mike's body, "[h]is face was encrusted with dried blood," and his "hair was a matted mass of hair, brain, blood." 38 RR 59; State's Ex. 1-B.

The autopsy revealed no less than ten wound complexes on the head. *Id.* The largest wound was a gaping tear four inches long, through which the brain was visible, where a blunt-force blow caused the bone to fragment, some of it being driven into the brain. 38 RR 61; State's Ex. 1-C. The medical examiner testified that a "[t]remendous amount of force" would be necessary to create such damage in the thickest area of the skull. *Id.* He described that "[t]he whole head was caved in and the bone was broken into little fragments, in splinters." 38 RR 61. Further examination of Mike's brain revealed "lacerations or tears in the lobes of the brain and hemorrhages throughout the control centers of the brain." 38 RR 63. Mike was alive and conscious when he received every one of the blows. 38 RR 71; 40 RR 27. The examiner also testified that the blows would have been tremendously painful, "especially the scalp." 38 RR 71.

Mike also suffered a fractured rib that was driven into his chest cavity so as to impale the lung. 38 RR 71-72. Only a severe blow could have caused such an injury in a young man. 38 RR 72-73. This injury alone could have been fatal, but the head injuries were the cause of death. 38 RR 73. Mike also had a gunshot wound on the

back of the right forearm and a potentially related gunshot wound below the navel where the same bullet passed through the soft tissue of the arm, penetrated his side, and fractured his pelvis. 38 RR 77-79.

II. The Punishment Trial

The state court summarized the State's punishment-phase evidence which consisted of testimony concerning Chambers's previous theft crime and his prison disciplinary history. *Chambers v. State,* 903 S.W.2d at 24-25.

A. Chambers's mitigation evidence

Chambers mostly presented evidence from his family of his good character. Specifically, his solid, tradional upbringing, religious tendencies, and kindness to his family. Ancillary to this testimony were brief mentions of the tough atmosphere of the west Dallas projects. It is on the basis of this almost non-existent evidence that the court below granted relief.

Cathy Hill, Chambers's former girlfriend and the mother of his child, testified that Chambers cared for and supported both her and her daughter, and consistently corresponded with her and her daughter throughout his incarceration. 42 RR 79-83, 85. Rhonda Mayes, Chambers's daughter, likewise testified that her father sent her letters and birthday cards from prison. *Id.* at 88-90.

Chambers's relatives presented modest evidence of good and nonviolent character. Rosa Chambers, his mother, remarked that Chambers reacted appropriately

to discipline, attended school and church, respected others, had a good sense of humor, and was well-liked. 42 RR 131-34. Herman Chambers, his father, testified that Chambers was respectful, that younger children liked him, that he told jokes, and that "he always had a smile." *Id.* at 194-95. He stated that Chambers sometimes worked all night on painting jobs. *Id.* at 196. Herman testified that his son did not appear to be a bully and seemed to care about people. *Id.* at 199-200. He also remarked that Chambers kept in contact with his family during his incarceration. *Id.* at 201.

Patty Chambers, his sister, testified that Chambers appeared to be a "normal kid" when he was growing up. 42 RR 120-21. She testified that he respected his family and elders, and that he had a good sense of humor and personality. *Id.* at 122. James Chambers, his uncle, similarly testified that Chambers was a normal child who respected his elders, attended school, and was polite. *Id.* at 124-26. He also stated that Chambers helped him unload groceries and tend the yard. *Id.* at 127. Ron Byrd, his cousin, testified that he was "very surpris[ed]" when Chambers, who he deemed to have a "good mind," was charged with capital murder. *Id.* at 101, 117. Glenn Byrd, another cousin, likewise testified that Chambers was respectful and pleasant. *Id.* at 213, 216. Doris Mead, yet another cousin, testified that children loved Chambers. *Id.* at 141-43.

Members of Chambers's religious community also testified on his behalf. Raymond Hunter, pastor for the Galilee Church of Christ in West Dallas, testified that Chambers respected him and refused money for assisting the church. 42 RR 148. He also remarked that Chambers avoided the use of profanity at church. *Id.* at

149. Howard Falls, a mail processor and limousine driver ordained in the Church of Christ who grew up with Chambers, stated that he never knew Chambers to intentionally harm another in all his life. *Id.* at 158. Neighbors also testified for Chambers. Wayne Sternes testified that "everybody loved [Chambers]." *Id.* at 171-72. He stated that Chambers "does not have a violent nature, other than a nature a normal kid would have." *Id.* at 174. Julius Sternes, also a former neighbor, testified that "for the kids in our community [Chambers] was a normal, peaceful guy, cordial and helpful." *Id.* at 182. He also stated that Chambers and Chambers's sister were the only individuals he knew who participated in "sitting under the light" on Saturday evenings, when they would study for the next day's Sunday school. *Id.* at 184. Finally, Chambers offered expert testimony to show he was unlikely to be a major discipline problem in prison, that he was not prone to commit acts of violence in the future, and he does not have an antisocial personality disorder. 43 RR 42-43, 56, 89, 98.

B. The jury charge

Pursuant to state law, Chambers's jury was charged with answering two special issue questions:

> Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would occur?[3]

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[3] This is the "deliberateness" special issue.

> Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?[4]

I Tr 151-52; *see* Tex. Code Crim. Proc. art. 37.071 (West 1992). The trial court also provided the jury with a supplemental instruction:

> When you deliberate about the questions posed in the Special Issues, you are to consider any mitigating circumstances supported by the evidence presented in both phases of the trial. A mitigating circumstance may be any aspect of the defendant's character and record or circumstances of the crime which you believe makes a sentence of death inappropriate in this case. If you find there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the Special Issues. If you determine, in consideration of this evidence, that a life sentence, rather than a death sentence, is an appropriate response to the personal moral culpability of the defendant, you are

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[4] This is the "future-dangerousness" special issue.

> instructed to answer at least one of the Special Issues under consideration "No."

I Tr 148.[5]

III. Direct Appeal and Postconviction Proceedings

"At his third trial[6] in 1992, [Chambers] was convicted of capital murder and sentenced to death, for the third time, for the 1975 murder of Mike McMahan during the course of a robbery." *Chambers v. Quarterman,* 191 Fed. Appx. 290, 292 (5th Cir. 2006)(footnote not in original). The Court of Criminal Appeals of Texas affirmed his conviction on direct appeal and denied habeas corpus relief. *Chambers v. State,* 903 S.W.2d 21, 34-35 (Tex. Crim. App. 1995); *Ex parte Chambers,* No. 7,929-03 (Tex. Crim. App. 1999) (unpublished order). On federal habeas review, the lower court denied Chambers's petition and the appellate court affirmed. *Chambers,* 191 Fed. Appx. at 299-302.

Shortly before his scheduled execution, this Court stayed Chambers's execution while it considered *Abdul-Kabir,* and *Brewer v. Quarterman,* 127 S. Ct. 1706 (2007). After issuing these opinions, this Court granted Chambers's certiorari petition and remanded for consideration of its latest rulings. PA II: 6-7 (*Chambers*

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[5] This instruction is substantially similar to the "nullification instruction" at issue in *Penry v. Johnson,* 532 U.S. 782 (2001) ("*Penry II*").

[6] Chambers was originally convicted and sentenced in 1975. His conviction was overturned on a successive state writ for *Estelle v. Smith,* 451 U.S. 454 (1981), error. Chambers was re-indicted and re-tried in 1985, but his conviction was again reversed based on *Batson v. Kentucky,* 476 U.S. 79 (1986), which was decided after his trial.

v. Quarterman, 127 S. Ct. 2126 (2007)). In light of the remand, the Fifth Circuit reversed the district court's judgment, remanding with instructions to conditionally grant the writ by requiring Chambers to be resentenced and otherwise reinstated its previous opinion. PA I: 2-4. Specifically, the court below found:

> Upon reconsideration in the light of *Abdul-Kabir*, we conclude that Chambers's mitigating evidence of his exposure to violence and drugs, his lack of role models, and his lack of economic opportunity while being raised in the projects of west Dallas, had, in the view of five members of the Supreme Court, relevance to a reasoned moral judgment in imposing the death penalty, which evidence could not be given meaningful effect in answering the special issues on deliberateness and future dangerousness.

PA I: 2. Thus the court below assumed based on the remand from this Court that Chambers's evidence was unable to be properly considered under the former Texas sentencing issues even though it characterized such evidence as " very scant." PA I: 2, n. 1. The lower court then denied the State's petition for rehearing. PA III: 9-10 (*Chambers v. Quarterman*, No. 03-11248 (5th Cir. Jan. 28, 2008) (unpublished order denying rehearing en banc)).

REASONS FOR GRANTING THE WRIT

Chambers has spent over thirty years on death row. And he has received more than his share of due process having had his conviction reversed twice for legal technicalities that did not implicate his guilt. Thus, granting relief because there is a possibility a jury was unable to fully consider his scant evidence of poverty results in another windfall for a man thrice sentenced to death for callously shooting two people until his gun jammed and, upon discovering they were still alive, brutally beating them until he crushed the man's skull, also leaving the woman for dead.

Shortly before Chambers's long-awaited execution date, this Court granted certiorari in *Abdul-Kabir* and *Brewer,* holding this case in abeyance and, yet again revisiting the issue of when *Penry* error occurs. *Penry* error occurs when the jury is unable to give meaningful effect to certain types of mitigating evidence; thus, the death sentence would not necessarily reflect the jury's "reasoned moral response." But underlying this "moral response" is nothing more than the jury's determination that, at the end of the day, the mitigating evidence did not outweigh the aggravating evidence. Yet no reasonable jury would find Chambers's weak evidence of poverty so sympathy-provoking as to overcome the horrific murder and attempted murder he committed. And requiring an expensive and difficult –if not impossible– retrial more than three decades later is fundamentally at odds with the traditional role of habeas corpus review. This Court should review this case because no other case presents the legal issues as cleanly and starkly as this one. There is no more perfect vehicle

to showcase the inequities inherent in knee-jerk reversals without consideration of harm.

In the instant case, the lower court read this Court's remand as instructions to reverse. Bound by the strictures of the en banc decision in *Nelson,* —and in clear contravention of this Court's precedents— it refused to consider harm, deciding there was error without any consideration of the persuasiveness, relevance or even amount of Chambers's evidence. But as the record fairly shows, in this case, any constitutional error did not have a "substantial and injurious effect or influence" on the verdict.

Further, the appellate court's ruling is extreme in that it holds that mere poverty is so sympathy-provoking as to render a defendant less morally culpable in the same way as mental illness, retardation, and severe child abuse. Read broadly this opinion can support the proposition that any categorical disadvantage entitles a defendant to relief if he was sentenced under the former Texas special issues. Yet the court below has found it impossible to maintain this position. *See, e.g., Smith v. Quarterman,* 515 F.3d 392, 414 (5th Cir. 2008). This remarkable inconsistency only highlights the injustice of this case. It is the fundamental unfairness of granting Chambers relief for the third time –which practically insures that the State will never be able to carry out its mandate– that begs for this Court's review.

I. The Lower Court Erred in Finding *Penry* Error Because this Court's Rulings in *Abdul-Kabir* and *Brewer* Did Not Fundamentally Alter its Prior Jurisprudence. And There Was No Argument from the Prosecutor That Confined the Jury's Consideration of the Evidence.

In *Abdul-Kabir* and *Brewer,* this Court held that *Penry* error occurs when there is a reasonable likelihood a jury is not permitted to give "meaningful effect" or a "reasoned moral response" to a defendant's mitigating evidence. *Brewer,* 127 S. Ct. At 1710, 1712; *Abdul-Kabir,* 127 S. Ct. at 1675. The Court made it clear that this "firmly established" principle had remained unchanged since 1976. *Abdul-Kabir,* 127 S. Ct. at 1664. But the Court also explained that "[t]he former [Texas] special issues provided an adequate vehicle for the evaluation of mitigating evidence offered to disprove deliberateness or future dangerousness." *Id.* at 1670. Similarly, the special issues are satisfactory "when mitigating evidence has only a tenuous connection — 'some arguable relevance' — to the defendant's moral culpability." *Id.* at 1668 n.14.

The Court further explained that, in *Abdul-Kabir,* the "evidence of childhood deprivation and lack of self-control did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence," *i.e.,* "his violent propensities were caused by factors beyond his control — namely, neurological damage and childhood neglect and abandonment." *Id.* at 1661, 1672. Similarly, "Brewer's mitigating evidence served as a 'two-edged sword' because it tended to confirm the State's evidence of future dangerousness as

well as lessen his culpability for the crime." *Brewer,* 127 S. Ct. at 1712. Further, the special issues also failed in *Abdul-Kabir* because they were "undermined" by prosecutorial argument "that the law compels [the jury] to disregard the force of evidence offered in mitigation." 127 S. Ct. at 1673. The *Brewer* opinion reached the same conclusion. Thus, it was this overly aggressive prosecutorial argument that distinguished *Abdul-Kabir* and *Brewer* from *Johnson v. Texas,* 509 U.S. 350 (1993), and *Graham v. Collins*, 506 U.S. 461 (1993). *Id.*

Evidence such as good and non-violent character despite an impoverished or disadvantaged upbringing — offered to prove that Chambers's "brief spasm of criminal activity" was "an aberration that was not likely to be repeated" — "is *primarily, if not exclusively,* relevant to the issue of future dangerousness," and "could easily have directed jurors towards a 'no' answer with regard to [that] question." *Id.* at 1667, 1673 & n.23 (quoting *Graham,* 506 U.S. at 475-76) (emphasis added). Chambers's evidence is precisely this kind. And if this is not the case in which "the special issues provided for adequate consideration of the defendant's mitigating evidence," then this Court would not have noted the "reassuring" fact that not every case "would require a new sentencing" hearing in *Abdul-Kabir.* 127 S. Ct. at 1671 & n.20. Instead, every case would be subject to reversal no matter what evidence was adduced at trial.

Chambers's entire mitigation case is summarized above. Overwhelmingly, he presented traditional good character evidence which this Court has stated is able to be fully considered under the special issues. *Graham,* 506 U.S. at 466. Thus, it is only the occasional asides of Chambers's childhood in the West Dallas Projects on

which the court below granted relief. But all of Chambers's evidence was offered by defense counsel to prove that Chambers would not be a future danger. *See, e.g.*, 47 RR 23 ("It's sometimes hard to find people after 17 years who will come in here and tell you how he was liked, how he was loved, how he laughed, how the little children loved him, how he went to school, how he had friends"). Counsel highlighted the fact that Chambers had not committed any criminal acts of violence in his seventeen years on death row, his advanced age made that possibility increasingly remote, and his mental status was perfectly normal. *Id.* at 26-37, 39-40, 53–54. In fact, counsel spent nearly all of his time discussing Chambers's self-control and lack of future dangerousness.

Counsel's only mention of Chambers's disadvantaged background was for the purpose of explaining why he did not outwardly show remorse when he was indeed remorseful within.[7] *See, e.g., id.* at 38-39 ("He grew up in an area where you didn't cry"). Counsel's only reference to Chambers's daughter was an

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[7] In his lower-court brief, Chambers noted two other points during closing argument at which the defense "emphasized — separately and without reference to the dangerousness special issue — Mr. Chambers'[s] ... difficult environment growing up in the projects." Chambers Brief at 29 n.5 (quoting 47 RR 22, 46). The first is counsel's statement that both the victim and Chambers "were both boys," both "grew up in a fine family," and with "a lot of friends," despite the fact they grew up in a "different environment." 47 RR at 22. This can hardly be read as a description of Chambers's disadvantaged upbringing. Indeed, "different" and "difficult" do *not* have the same meaning in this context or any context. Similarly, counsel's reference to "living in the projects" contains no suggestion that Chambers was less culpable as a result. *Id.* at 46. Chambers's embellishment of the record aside, it is clear that the entire defense case rested on the premise that Chambers's was nonviolent and would not be a future danger.

acknowledgment that he too had "normal human feelings," which occurred within a long discussion concerning the credibility of Chambers's mental-status evidence. *Id.* at 39-46. Counsel's sole references to Chambers's relationship with his daughter and his impoverished upbringing amounts to approximately *nine lines* within nearly *nine-hundred* lines of argument.

This Court reasoned that the special issues in *Abdul-Kabir* and *Brewer* failed because they were "undermined" by prosecutorial argument "that the law compels [the jury] to disregard the force of evidence offered in mitigation," or to "disregard[] any independent concern that, given [the defendant]'s troubled background, he may not be deserving of a death sentence." *Abdul-Kabir,* 127 S. Ct. at 1673; *Brewer,* 127 S. Ct. at 1712. It was this dilemma that distinguished *Abdul-Kabir* and *Brewer* from *Johnson* and *Graham. Abdul-Kabir,* 127 S. Ct. at 1673 & n.23. But no such argument was made in this case. Thus, a juror considering Chambers's evidence would *not* feel compelled to provide a "yes" answer to the future-dangerousness question. Instead, that juror would find ample means for giving *meaningful* effect to Chambers's evidence by "accept[ing] the suggestion ... that his brief spasm of criminal activity ... was properly viewed ... as an aberration that was not likely to be repeated." *Abdul-Kabir,* 127 S. Ct. at 1673 & n.23 (emphasis in original).

In the court below, Chambers conceded that "the prosecution was mostly silent regarding [his] evidence of his difficult background and his ongoing caring relationships with his daughter and family." Chambers's Brief at 29 n.5. He never identified a single instance

where the prosecutors told the jury to ignore the mitigating evidence.

In light of the absence of traditional *Penry* evidence, and the lack of prosecutorial argument limiting the jury's consideration of mitigating evidence, it is clear that the lower court's decision is at odds with this Court's precedent. Certiorari review is necessary to correct this injustice.

II. The Precedent of this Court Makes Clear That *Penry* Error Is Not Structural Error, Thus the Inquiry Does Not End upon the Determination That There Was a Reasonable Likelihood That the Jury Was Precluded from Considering and Giving Effect to the Defendant's Mitigating Evidence.

A. With only the exception of defective reasonable-doubt instructions, this Court has unequivocally held jury-charge error to be trial error.

It has long been settled that "trial error" is that which has "occurred during the presentation of the case to the jury, and . . . may therefore be qualitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." *Arizona v. Fulminante*, 499 U.S. 279, 207-08 (1991). The *Fulminante* Court recognized that "most constitutional errors can be harmless." *Id.* at 306. *See also United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006). And as the Court explained in *Neder v. United States*, "'[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that

any other constitutional errors that may have occurred are subject to harmless-error analysis.'" 527 U.S. 1, 8 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)), *see also id.* at 9.

Structural defects, on the other hand, are different and exceedingly rare. With such errors, "[t]he entire conduct of the trial from beginning to end is . . . affected." *Fulminante*, 499 U.S. at 309-10. In this way, then, structural defects "'defy analysis by "harmless-error" standards' because they "affec[t] the framework within which the trial proceeds," and are not 'simply an error in the trial process itself.'" *Gonzalez-Lopez*, 126 S. Ct. at 2564 (quoting *Fulminante*, 499 U.S. at 309-10) (alterations in original). Indeed, the Court has only found structural error in six discrete instances. *See Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of counsel); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand-jury selection); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction). As the Court concluded in *Rose*:

> Placed in context, the erroneous . . . instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction . . . [because] the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced [the defendant] thus does not require any difficult inquiries concerning matters that

> might have been, but were not, placed in evidence. Consequently, there is no inherent difficulty in evaluating whether the error prejudiced respondent in this case.

478 U.S. at 579-80 & n.7 (citations omitted).

Consistent with these principles, most jury-charge errors have been held to be trial errors subject to harmless-error analysis. *See Washington v. Recuencco*, 126 S. Ct. 2546 (2006) (failure to submit sentencing factor to jury); *Mitchell v. Esparaza*, 540 U.S. 12 (2003) (per curiam) (instruction omitted element of offense); *Neder* (instruction omitted element of offense); *Calderon v. Coleman*, 525 U.S. 141 (1998) (misleading jury instruction); *Clemmons v. Mississippi*, 494 U.S. 738 (1990) (state court invalidated aggravating factor as a matter of state law after the verdict); *Carella v. California*, 491 U.S. 263, 266 (1989) (erroneous conclusive presumption in jury instruction); *Pope v. Illinois*, 481 U.S. 497, 501-04 (1987) (jury instruction contained wrong constitutional standard); *Rose* (instruction improperly shifted burden of proof on element of crime). *But see Sullivan* (improper definition of "beyond a reasonable doubt" nullifies verdict and results in structural error).

Chambers's jury was charged according to state law at the time of his trial: the special issues asked the jury to consider his future dangerousness and the deliberateness of his actions. Additionally, Chambers's jury, having been empaneled shortly after *Penry I* was decided, was given the supplemental instruction later found to be an inadequate remedy in *Penry II*. This is

classic jury-charge error. *See Smith II*, 127 S. Ct. at 1699 (Alito, J., dissenting) ("The federal constitutional error that occurred in the penalty phase of petitioner's trial and that was identified in *Smith v. Texas*, 543 U.S. 37 [] (2004) (per curiam) [], concerned a flaw in the jury instructions[.]"). As such, it is properly classified as trial error.

B. That *Penry* error arises in the context of death penalty case does not transform such garden-variety trial error into structural error.

This Court's Eighth Amendment jurisprudence demands that a capital sentencing jury not be precluded from considering, as a mitigating factor, the character and record of the individual offender, as well as the circumstances of the particular offense. This ensures that the jurors will be able to give their "reasoned moral response" to the defendant's mitigating evidence. *E.g.*, *Penry II*, 532 U.S. 782; *Penry I*, 492 U.S. 302; *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality op.). In Texas, when the jury is so precluded, this gives rise to *Penry* error. But the Court has not hesitated to find these types of jury-instruction problems amenable to harmless-error analysis. The lower court, on the other hand, has carved a new exception out of whole cloth: "moral judgements" are not subject to harmless-error review. *Nelson*, 472 F.3d at 314-15 & n.8.

In a major departure from this Court's general rule that jury-charge error is trial error, even where the death penalty has been imposed, the court below suggests that *Penry* error should be structural error. *Id.*

Nelson relied principally on the absence of any harm analysis — and the lack of any suggestion that harm analysis might be appropriate — from the *Penry* line of cases. *Id.* at 314 (citing *Tennard v. Dretke*, 542 U.S. 274 (2004); *Penry II*, 532 U.S. 782; *Penry I*, 492 U.S. 302). This absence, the court explained rests on

> the recognition that *Penry* error deprives the jury of a "vehicle for expressing its 'reasoned *moral* response' to the defendant's background, character and crime,'" which precludes it from making "'a reliable determination that death is the appropriate sentence.'" *Penry II*, 532 U.S. at 797 [] (quoting *Penry I*, 492 U.S. at 328 []) (internal quotation marks omitted) (emphasis added). This reasoned *moral* judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments made in response to the special issues.

Id. at 314-15 (emphasis in original).

As an initial matter, the absence of something does not make the opposite true. That aside, in deciding as it did, the lower court wholly ignored that the "reasoned moral response" is nothing more than a factual determination that, in the minds of the jurors, the defendant's mitigating evidence did not overcome whatever aggravating factors were at play, including but not limited to, the facts of the crime and the defendant's prior criminal history. Especially instructive is this

Court's determination that *Hitchcock*[8] error can be harmless. *See Singletary v. Smith*, 507 U.S. 1048 (1993) (granting certiorari and remanding to appellate court in light of recent opinion in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

At issue in *Hitchcock* was a Florida statute limiting the mitigating circumstances a jury or judge could consider to only those enumerated. 481 U.S. at 395-96. While defense counsel argued to the jury that "it was to 'look to the over picture . . . consider everything together . . . consider the whole picture, the whole ball of wax," the prosecutor insisted that the jury was to "consider the mitigating circumstances and consider those by number.'" *Id.* at 398 (internal citations omitted). Further, the trial judge instructed the jurors that they were to consider only those aggravating and mitigating circumstances as allowed for by state law. *Id.* This violated the Eighth Amendment:

> We think it could not be clearer that the advisory jury was not instructed to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1 [] (1986), *Eddings v. Oklahoma*, 455 U.S. 104 [], and *Lockett v. Ohio*, 438 U.S. 586 [].

Id. at 398-99. No meaningful difference exists between the law invalidated in *Hitchcock* and the Texas special

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[8] *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

issues found to be inadequate in *Penry I*, *Abdul-Kabir*, and *Brewer*.

C. The conclusion that the jury instructions created a reasonable likelihood of misapplication does not end the inquiry.

When a claim involves jury instructions in capital-sentencing proceedings, the relevant inquiry is whether there is a reasonable likelihood the jury applied them in such a way that precluded consideration of the defendant's mitigating evidence. *Boyde*, 494 U.S. at 380; *see also Abdul-Kabir*, 127 S. Ct. at 1673-674; *Smith II*, 127 S. Ct. at 1698; *Estelle v. McGuire*, 502 U.S. 62, 72 & n. 4 (1991); *Nelson*, 472 F.3d at 311. But as *Calderon* explained, even where a *Boyde* analysis has been made, a federal habeas court must go one step further:

> Although the *Boyde* test for constitutional error, like the *Brecht* harmless-error test, furthers the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation," 494 U.S. at 380 [], it is not a substitute for the *Brecht* harmless-error test. The *Boyde* analysis does not inquire into the actual effect of the trial error on the jury's verdict; it merely asks whether constitutional error has occurred.

525 U.S. 146-47.

This Court has been very clear when concluding constitutional error required automatic reversal. *See, e.g.*, *Gonzalez-Lopez*, 126 S. Ct. at 2564 ("[E]rroneous

deprivation of the right to counsel of choice, . . . qualifies as 'structural error.'"); *Sullivan*, 508 U.S. at 281-82 (denial of trial by jury due to a defective reasonable doubt instruction "unquestionably qualifies as structural error"); *Vasquez*, 474 U.S. 263-64 ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review."). But with respect to *Penry* error, no such suggestion, much less a plain statement, has ever been made despite numerous opportunities to do so. For good reason: because *Penry* error, like all other trial errors, should not require automatic reversal and is thus subject to harmless-error analysis.

III. Even If There Is *Penry* Error in this Case, the Record Does Not Support a Finding That the Error Had a "Substantial and Injurious Effect or Influence" on the Verdict.

Brecht mandates that the standard of review for harm should be "whether the error 'had a substantial and injurious effect or influence in determining the jury's verdict.'" 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). *See also Fry v. Pliler*, 127 S. Ct. 2321 (2007). This means that "a harmlessness finding requires 'fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" *Id.* at 2330. (Stevens, J., concurring in part and dissenting in part) (quoting *Kotteakos*, 328 U.S. at 765). The policies underlying *Brecht*'s harmless-error standard are "the State's interest in the finality of convictions," comity, and federalism during collateral review. 507 U.S. at 635. Granting relief without any evidence of actual harm

violates the role of habeas corpus review: traditionally a vehicle to grant relief to those whom society has 'grievously wronged.'" *Id.* at 637. Yet, Chambers has not been "grievously wronged."

The lower court's grant of relief to Chambers is based on negligible evidence. Any depiction of Chambers's "ghetto childhood" and exposure to drugs, violence and crime is on the basis of a handful of words, uttered in passing, by a few witnesses, for example: defense punishment-phase witness Ron Byrd's mention of "a lot of bad influence." 42 RR 94-95, 105. At trial, counsel's only mention of Chambers's disadvantaged background during closing argument was to explain why he did not outwardly show remorse when he was indeed remorseful within. *See, e.g.,* 47 RR 38-39 ("He grew up in an area where you didn't cry"). It is on the basis of this scant and unpersuasive evidence that the panel has determined Chambers is entitled to relief. PA I: 2-4.

Further the decision to grant relief in a thirty-three year-old case has significant costs. It remains to be seen whether the State can effectively retry Chambers's punishment case yet again. And if the State cannot salvage Chambers's death sentence, although his conviction will remain intact, he will become immediately parole eligible. Tex. Code Crim. Proc. Ann. Art. 42.12 § 15(a) (Vernon 1973). Certainly, the societal costs of this case, particularly in the administration of justice, weigh heavily in favor of considering harm. Notably, a cost-benefit analysis is part of any analysis under *Teague v. Lane*, 488 U.S. 289 (1989). And this Court has found that the costs of retroactive application generally, and almost certainly will outweigh the benefits. *See Sawyer v. Smith*, 497 U.S. 227, 242-43

(1990); *see also McKlesky v. Zant*, 499 U.S. 467, 490 (1991) (observing that when a habeas petitioner is granted a new trial, the "erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." (citation omitted)). In this context, habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Duckworth v. Egan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring). Therefore, the interests of justice — finality, comity, and federalism — strongly favor consideration of whether any *Penry* error had a "substantial and injurious effect or influence" on the verdict."[9] *Id.*

In the instant case, there is no doubt the instructions given to the jury were problematic under both *Penry I* and *Penry II*. But the state courts did not recognize the constitutional error, much less apply any sort of harm analysis. The *Fry* Court explained it is nevertheless the duty of the federal habeas court to conduct a harm analysis. 127 S. Ct. at 2328. Even so, the lower court did not conduct a harm analysis because whether such is applicable where there is *Penry* error has not been decided by this Court. It is nevertheless appropriate for this Court to consider whether the *Penry* error in this case was harmless. *See Yates v. Evatts*, 500

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[9] Importantly, the *Nelson* court did not even pay lip service to the concerns and principles on which the harmless-error analysis relies. 472 F.3d at 314-15; *see also id.* at 331-37 (Dennis, J., concurring and assigning additional reasons).

U.S. 391, 407 (1991) ("[W]e have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance.") (citation omitted); *Rose*, 478 U.S. at 407 ("[W]e 'plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error is harmless under the *Chapman* [*v. California*, 386 U.S. 18 (1967)] standard.") (citing *United States v. Hastings*, 461 U.S. 499, 510 (1983)).

In considering whether *Penry* error occurred under the former Texas sentencing issues, this Court has placed special emphasis on the fact that Texas juries are aware of the consequences of their actions and are thus "likely to weigh mitigating evidence as it formulates these answers in a manner similar to the one employed by capital juries in 'pure balancing states.'" *Johnson*, 509 U.S. at 370-71 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 182 n.12 (1988) (plurality op.)). Chambers's jury was likewise aware, as it was instructed that an affirmative answer to both special issues would result in the imposition of the death penalty and a negative answer to one would result in a life sentence.

The responsibility assigned to jurors in a capital murder trial is serious. We cannot assume they do not take it seriously. The *Lockett* Court presumed that "'jurors . . . confronted with the awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision.'" 438 U.S. at 598 (quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)). Nothing in the record suggests the jury in this case acted in a contrary manner. And ultimately, even taking into account the flawed special issue questions and the inadequate supplemental instruction,

nothing in the record suggests that the death sentence imposed reflects something less than the jury's "reasoned moral response." The Eighth Amendment was thus not offended.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

Respectfully submitted,

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PETITIONER

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Supreme Court, U.S.
FILED

071329 APR 18 2008

No. (2) OFFICE OF THE CLERK

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

RONALD CURTIS CHAMBERS,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX

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APPENDIX I

FILED December 27, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-11248

Ronald Curtis Chambers,

Petitioner - Appellant

v.

Nathaniel Quarterman, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas
(99-CV-1283)

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before JOLLY, SMITH, and WIENER, Circuit Judges.

PER CURIAM:*

Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

This court previously affirmed the district court's denial of Ronald Chambers's petition for a writ of habeas corpus. *Chambers v. Quarterman*, 191 F. App'x 290 (5th Cir. 2006). The Supreme Court vacated and remanded the case for further consideration in the light of *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (2007).

Upon reconsideration in the light of *Abdul-Kabir*, we conclude that Chambers's mitigating evidence of his exposure to violence and drugs, his lack of role models, and his lack of economic opportunity while being raised in the projects of west Dallas, had, in the view of five members of the Supreme Court, relevance to a reasoned moral judgment in imposing the death penalty, which evidence could not be given meaningful effect in answering the special issues on deliberateness and future dangerousness.[1] On the one hand, this evidence set out

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[1] The State is absolutely correct in its argument that Chambers's punishment phase defense was premised entirely on the lack of future dangerousness. In closing argument, Chambers's counsel argued that the evidence of Chambers's upbringing in a depressed, crime-infested neighborhood, along with the other mitigating evidence Chambers presented, supported a "no" answer to the special issue on future dangerousness. As the State correctly notes, there was very scant evidence of his upbringing in the ghetto, and the overwhelming focus of the testimony of all of Chambers's witnesses was on his positive character traits. Nevertheless, Chambers's counsel was constrained by the sentencing instructions and special issues, which narrowed the jury's focus to the issues of deliberateness and future dangerousness. Therefore, Chambers

above is not properly considered as rebuttal evidence to future dangerousness, and instead could be viewed as aggravating evidence because jurors might find that it made him more likely to commit acts of violence in the future than a defendant who came from a more stable environment. Yet, on the other hand, a properly instructed jury could have concluded that Chambers was less morally culpable for his crime because of his disadvantaged upbringing and would have had no means, under the deliberateness and future dangerousness instructions, of giving the evidence such effect. Thus, there is a reasonable likelihood that the instructions to the sentencing jury prevented the jurors from giving meaningful consideration and effect to that evidence. Furthermore, the state habeas court unreasonably applied clearly established federal law, as determined by the Supreme Court, when it concluded that the "nullification" instruction, which directed jurors to answer at least one of the special issues "no" if they found that a life sentence rather than a death sentence was an appropriate response to Chambers's personal moral culpability, allowed the jury to consider and give effect to

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cannot be penalized because his counsel did not specifically argue that Chambers was less morally culpable as a result of his disadvantaged upbringing.

his mitigating evidence. Accordingly, we REVERSE the judgment of the district court denying habeas relief, and REMAND with instructions to grant the writ and require a resentencing of Chambers within a reasonable time to be determined by the district court.[2]

REVERSED and REMANDED with instructions.

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[2] Our prior opinion affirming the denial of habeas relief on Chambers's remaining claims is reinstated.

APPENDIX II

IN THE UNITED STATES SUPREME COURT

No. 06-7263

Ronald Curtis Chambers,

Petitioner - Appellant

v.

Nathaniel Quarterman, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas

April 30, 2007, Decided

JUDGES: Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito.

OPINION

On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Abdul-Kabir v. Quarterman*, 550 U.S. , 127 S. Ct. 1654,

167 L. Ed. 2d 585, 2007 U.S. LEXIS 4536 (2007).

APPENDIX III

FILED January 28, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-11248

Ronald Curtis Chambers,

Petitioner - Appellant

v.

Nathaniel Quarterman, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Opinion 12/27/07, 5 Cir., _____, _____ F.3d _____)

Before JOLLY, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehear ing is DENIED.

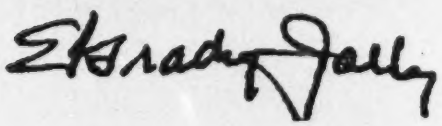
No member of the panel nor judge in regular active service of the court having requested that the court be

polled on Rehearing En Banc (FED . R . App . P . and 5TH CIR . R . 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED.

The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED . R . APP . P . and 5TH CIR . R . 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



United States Circuit Judge

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No. 07-1329

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

RONALD CURTIS CHAMBERS,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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Mere days before Chambers's long-awaited execution date, this Court granted certiorari and stayed his case in light of the litigation in *Abdul-Kabir*[1] and *Brewer*,[2] yet again revisiting the issue of when *Penry* error[3] occurs. After deciding those cases, this Court remanded Chambers's case for reconsideration. The lower court interpreted this remand as instructions to reverse, finding structural constitutional error and refusing to consider the Director's argument that any error was harmless. But granting relief because there is a possibility a jury was unable to fully consider Chambers's scant evidence of poverty is at odds with both this Court's habeas and *Penry* jurisprudence. Further, even on the remote chance the jury was somehow precluded from considering some of Chambers's evidence, where *Penry* error would result in a new sentencing trial after *thirty-three years,* the interests of justice certainly warrant application of the *Brecht*[4] standard. As demonstrated below, this issue is preserved for review, even though this Court's precedent does not require affirmative habeas defenses to be preserved. Furthermore, the impact of this ruling is far greater than Chambers asserts. For these reasons, this Court should grant certiorari review.

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1 *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007)

2 *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007).

3 *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*").

4 *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

I. The Director's Harmless-Error Argument Is Properly Presented for Certiorari Review and Is Not Waived.

Contrary to the arguments of Chambers, the Director did not waive a harmless-error defense. The defense was presented and argued in the court below. Director's Brief (after remand) at 22-28. The lower court did not find, or even suggest, that the argument had been waived. But the lower court was precluded from addressing it by the en banc decision in *Nelson v. Quarterman*, 472 F.3d 287, 314-15 (5th Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 2974 (2007). Further, Chambers's suggestion that the Director should have argued harmless error when there was no error under current law requires a level of foreseeability, this Court has never required.

Whether or not the Director previously raised harmless error is immaterial because it is well within a federal court's discretion to raise harmless error *sua sponte*. *See Yates v. Evatt*, 500 U.S. 391, 407 (1991) ("[W]e have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance.") (citation omitted); *Rose v. Clark*, 478 U.S. 570, 584 (1986) ("[W]e 'plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error is harmless under the *Chapman* standard.")[5] (citing *United States v. Hastings*, 461 U.S. 499, 510 (1983)).[6] Although this Court cautioned that reviewing records to determine harm should be done "sparingly," (*Id.* at 510

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[5] *Chapman v. California*, 386 U.S. 18 (1967).

[6] *Cf. Teague v. Lane*, 489 U.S. 288, 300 (1989) (addressing retroactivity despite the fact that it was raised only in an amicus brief).

(citations omitted)), the Court has made equally clear that the primary concern should be, and is, judicial economy. *Yates*, 500 U.S. at 407 ("Because this case has already been remanded twice, once for harmless-error analysis, we think we would serve judicial economy best by proceeding now to determine whether the burden-shifting jury instructions were harmless.").

More importantly, the unique concerns underlying federal habeas review must be considered. AEDPA was specifically enacted to prevent abuses and delays in habeas corpus litigation. It has specific and strictly enforced rules regarding successive petitions and exhaustion. *See* 28 U.S.C. §§ 2244(a), (b); 2254(b), (c). These rules were crafted to ensure piecemeal litigation was a thing of the past and to prevent petitioners from being in charge of the litigation, deciding when and how to bring their claims into federal court. Judicial economy and fairness, respect for the state courts, comity and the importance of a final judgment all played into the enactment of this legislation. *E.g.*, *McClesky v. Zant*, 499 U.S. 467, 489-93 (1991). These concerns have guided this Court's rulings on whether a federal court may apply an affirmative defense –exhaustion, non-retroactivity, procedural default– not raised by the State or, alternatively, consider such a defense raised for the first time on appeal. *See Granberry v. Greer*, 481 U.S. 129, 133 (1987) (federal appellate courts have discretion to consider the issue of exhaustion *sua sponte*); 28 U.S.C. § 2254(b)(3) (same); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (federal courts may *sua sponte* raise the issue of *Teague* non-retroactivity); *Trest v. Cain*, 522 U.S. 87, 90 (1997) (recognizing that courts of appeals have all held that a procedural default may be raised *sua sponte*). Additionally, this Court has recognized that the State is

"entitled to rely on any legal argument in support of the judgment below," even arguments not presented to the lower courts. *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (citing *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970)).

This Court recently reaffirmed the reasoning of *Granberry*, *Caspari*, and *Trest*, and held that a federal court may *sua sponte* apply AEDPA's statute of limitations against a habeas petitioner where the State has failed to do so, as long as: (1) the parties are accorded notice and an opportunity to address the issue; (2) the petitioner is not prejudiced by any delay; and (3) the interests of justice are served. *Day v. McDonough*, 547 U.S. 198, 210-11 (2006). The *Day* Court explained that the statute of limitations "'promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments while the record is fresh, and lends finality to state court judgements within a reasonable time.'" *Id.* at 205-06 (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)).

The *Brecht* harmless-error standard rests on the same policy justifications as exhaustion, non-retroactivity, procedural default, and limitations. Namely, "the State's increased interest in the finality of convictions," comity, and federalism during collateral review. *Brecht*, 507 U.S. at 635. Thus, a federal court should be permitted to *sua sponte* raise harmless error in any case in which it might also raise exhaustion, non-retroactivity, limitations, or procedural default where the *Day* factors are satisfied. In fact, the state court found this error to be harmless on direct review. *Chambers v. State*, 903 S.W.2d at 34-35. In this sense, Chambers has been on notice of a harmless-

error argument since 1995. Finally, as in *Day*, nothing in the record suggests that the Director "strategically withheld the defense or chose to relinquish it" in this case. 126 S. Ct. at 1684.

Where *Penry* error would result in a new sentencing trial after *thirty-three years*, the interests of justice certainly warrant application of *Brecht*. Granting habeas relief after so long merely because there is a *reasonable likelihood* the jury's verdict was negatively affected by a now-repealed sentencing statute "is at odds with the historic meaning of habeas corpus — to afford relief to those whom society has 'grievously wronged.'" *Brecht*, 507 U.S. at 637. Such a decision has significant social costs, "including the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time and make ... retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.'" *Id.* (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986)). Therefore, the interests of justice — finality, comity, and federalism — strongly favor consideration of whether any *Penry* error had a "substantial and injurious effect" on the verdict. *Id.*

II. The Question Presented Has Relevance Well Beyond the Context in which It Is Raised.

Despite Chambers arguments to the contrary, the question of whether *Penry* error is amenable to a harmless-error analysis is not a narrow one. It should not be considered solely in the context of those few remaining Texas-death-row inmates that may be affected by this Court's *Penry* jurisprudence. It should not be

brushed aside simply because the lower court's opinion is unpublished. Rather, the question should be considered, as the Director asserted in his petition, because the lower court's reasoning is fundamentally at odds with this Court's rulings. Furthermore, even if this case was the only one affected by the lower court's erroneous ruling (which it certainly is not), the State's interest in pursuing justice for a man thrice convicted and sentenced to death for the brutal beating death of another, is not something this Court should take lightly.[7]

In *Nelson*, the court of appeals determined that the because the jury-charge error at issue arose in the context of a death-penalty trial —and thus involved a "moral judgment"— it is structural error subject to automatic reversal. 472 F.3d at 314-15. But the reasoning of *Nelson* finds no support in this Court's precedents. First, *Penry* error is nothing more than jury-charge error. *See Smith v. Texas*, 127 S. Ct. 1686, 1699 (2007) (*Smith II*)(Alito, J., dissenting) ("The federal constitutional error that occurred in the penalty phase of petitioner's trial and that was identified in *Smith v. Texas*, 543 U.S. 37 [] (2004) (*per curiam*) [], concerned a

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[7] In footnote six, Chambers disagrees with the Director's characterization of his previous grants of relief as mere technicalities. Brief in Opp at 17. Specifically, he asserts that both were the result of prosecutorial misconduct. *Id.* The Director vehemently denies such misconduct on the part of the prosecutors. As the Director noted in his petition, Chambers was granted relief on the basis of *Estelle v. Smith*, 451 U.S. 454 (1981) and *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. at 12, n.6. These cases were both decided after Chambers had been tried and convicted. *Id.* A prosecutor should not be faulted for failing to see changes in the law anymore than defense counsel. Without a doubt, Chambers's prosecutors would have wished to avoid any error in this case to see that justice for Mike McMahon might be served.

flaw in the jury instructions[.]"). As such, *Nelson*'s determination flies in the face of this Court's well-established precedent holding that jury-charge error is nearly always trial error and thus subject to a harm analysis. Pet. at 20-21. Second, merely because it arises in the context of a death-penalty case does not mean that it automatically gives rise to structural error. As this Court recognized in *Mitchell v. Esparaza*, "a number of our harmless-error cases have involved capital defendants[.]" 540 U.S. 12, 16-17 (2003) (per curiam) (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (unconstitutional admission of coerced confession at guilt stage); *Clemons v. Mississippi*, 494 U.S. 738 (1990) (unconstitutionally broad jury instructions at sentencing stage); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (unconstitutional admission of evidence at sentencing stage), and *Ring v. Arizona*, 536 U.S. 584, 609, n. 7 (2002) ("We do not reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict.")).

Importantly, this Court has just granted certiorari review in a case where the Court of Appeals for the Ninth Circuit held that a jury-charge error involving instructions on alternative theories of criminal liability was in fact structural, thus subject to automatic reversal. *Chrones v. Pulido*, 128 S. Ct. 1444 (2008). Like the appellate court in that case, the Fifth Circuit has created a potentially enormous exception to the mandate of *Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007), that is, that trial error is to be reviewed "under the 'substantial and injurious effect' standard set forth in *Brecht*," 127 S. Ct. at 2328. Under *Nelson*'s reasoning, anytime there is jury-charge error during the punishment trial of capital-murder trial, it could well be classified as structural, thus

abrogating *Fry* for simple instructional error. The concerns and purposes of federal habeas review demand that such cannot be left standing.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

Respectfully submitted,

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